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32506

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No._____

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, South Atlantic Steamship Company of Delaware, respectfully prays that a writ of certiorari issue from this Honorable Court to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered February 13, 1941, (R. Vol. I p. 199) in a cause there numbered 9491, in so far as that decree refused to review and set aside an order of the National Labor Relations Board and required petitioner to cease and desist from certain actions and to take certain affirmative actions, including an offer of rein-

statement and back pay to twenty-three (23) seamen formerly employed by petitioner as members of the crew of the S/S "Saccarappa", and to comply with the said order of the National Labor Relations Board.

OPINION BELOW

The opinion of the Court below (R. Vol. I p. 175) is reported in 116 Fed. (2d) page 480. The findings of fact and conclusions of law of the National Labor Relations Board (R. Vol. I p. 121) are reported in 12 N.L.R.B. 1367. The Intermediate Report of the Trial Examiner (R. Vol. I p. 64) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 §347 United States Code) and under Section 10 (e) and (f) of the National Labor Relations Act (Title 29 §160 (e) and (f) of the Supplement to United States Code Annotated).

QUESTIONS PRESENTED

One.

When the International Seamens Union, an A. F. of L. affiliate, which was the free and unassisted bargaining agent of an appropriate group of petitioner's employees, demanded with threat of strike etc., that petitioner, the owner of a fleet of six vessels, refuse to reemploy a small minority of such

group (to-wit, the unlicensed members of the crew of one vessel) unless such minority rejoin the Union to which all of the remaining members of the group belonged:

(a) Did Petitioner, by reluctantly yielding to such threat, violate the National Labor Relations Act?

(b) Did the Union and petitioner by reaching an understanding and publicly announcing that petitioner would only reemploy the seamen if they rejoined that Union, make a valid closed shop agreement, as authorized by the Proviso in Title 29 §158 (3) United States Code Supplement, which reads:

> "Provided, that nothing *** shall preclude an employer from making an agreement with a labor organization *** to require as a condition of employment membership therein ***."?

Two.

In 1935, prior to the adoption of the National Labor Relations Act, petitioner, along with other shipping companies, entered into a valid written collective bargaining agreement with the International Seamens Union. The agreement on its face only required petitioner to give preference of employment to members of that Union. The unlicensed crew of the S/S "Saccarappa" had obtained their employment under and by virtue of that contract. The parties intended that petitioner would perform that contract and it was performed at Savannah,

Georgia, the home port of the S/S "Saccarappa" and of petitioner's other vessels.

Should this written contract be construed according to "the general law" or according to the laws of Georgia which hold that the contract contains an implied term that persons who obtain employment under the contract must remain members of the International Seamens Union.

Three.

(a). When the National Labor Relations Board has found that an employer has in violation of the National Labor Relations Act discharged employees, must the Board, without the exercise of any discretion and as a matter of course, order reinstatement with back pay?

(b). Is the award of reinstatement and back pay to be made as a matter of right to the former employees?

(c). What power or discretion has the Board in awarding back pay to the former employees:

1. Where an employer is made the innocent victim of a dispute between rival unions:

2. Where the former employees have in the meantime obtained "regular and substantially equivalent employment."

(d). Whether the Board, in making a back-pay award is required to provide for the deduction of amounts which the recipient could have earned, but did not.

(e). Must the Board make findings to justify an award of reinstatement with back pay?

Four.

The Board having held that because of the peculiar nature of the seamen's employment the ship owner must allow the representatives of the bargaining agent of the crew to board its vessels, what duty is there on the ship owner to allow the representatives of other unions to board its vessels?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to our brief.

STATEMENT

Petitioner owned a fleet of six vessels engaged in the transportation of freight between the home port of Savannah, Georgia, and other ports in the South Atlantic Range from Wilmington, N. C., to Jacksonville, Fla., and certain European ports. Petitioner's financial and operating headquarters were at Savannah, Georgia, which was also the home port of the vessels. (R. Vol. II p. 2).

In 1935, prior to the enactment of the National Labor Relations Act and prior to the organization of the N.M.U., a C.I.O. affiliate, petitioner, along with other shipping companies, entered into an agreement with I.S.U., an A. F. of L. affiliate. (R. Vol. I p. 176; Vol. II p. 127).

Article II of Section 1 of the agreement as construed by this Honorable Court in *N.L.R.B.* vs *Waterman* 309 U. S. 206 merely required that as vacancies occur preference of employment be given members of the I.S.U.

As the Circuit Court of Appeals said: "Within a comparatively short time thereafter all of the seagoing unlicensed personnel, hereafter for brevity designated as seamen, on all of petitioner's ships had become members of the I.S.U.

"On August 3, 1937, shipping articles were signed aboard the steamship Saccarappa at Savannah, Georgia, for a foreign voyage. On September 20, 1937, the ship returned from this foreign voyage and docked at Charleston, South Carolina, and all of the seamen were formally signed off the Foreign Articles and all were paid in full. The ship on September 21 sailed for Wilmington, North Carolina with the same seamen and while at sea, the seamen signed coastwise articles. On September 22, the ship arrived at Wilmington, and while there, an organizer from N. M. U. boarded her and all of the seamen, 23 in number, who had been members of the I. S. U. left that union and joined N. M. U. On September 23, the ship sailed from Newport News, Virginia, to undergo repairs, left Newport on September 30 and arrived in Savannah on October 5, where the seamen were signed off the coastwise articles and paid in full. Word of the change of unions having come to Waid, the rep-

resentative of I.S.U., he notified petitioner that if these men were no longer members of I.S.U. petitioner under its agreement could not sign them on for another foreign voyage. As petitioner was being made the victim of a dispute between rival labor unions and its agreement with I.S.U. would expire on December 31, 1937, petitioner endeavored to obtain Waid's consent to sign the 23 men on for another foreign voyage. This was refused with the threat that if they were signed on, the American Federation of Labor would call a strike of all I.S.U. seamen on petitioner's ships and also of the longshoremen." (R. Vol. I p. 177). 116 Fed. (2) 481—2.

As the Board said: "On the morning of October 6, a United States shipping commissioner refused to permit the entire unlicensed crew of 23 men to sign shipping articles. This was done upon the instructions from the Captain and the I.S.U. agent who were on board and who informed the men that they would not be permitted to make the foreign voyage unless they joined the I.S.U." (R. Vol. I p. 129).

Drews, the Board's chief witness and the N.M.U. ship's delegate testified that on October 6, 1937, he asked Captain Olsen, the Master of the "Saccarappa", why he was getting fired; the Master replied: "Don't you think that you are foolish being a married man and having a family to support to quit now. We have a contract with the I.S.U. which

runs until December. Why don't you join up to the I.S.U. and you can have your job back?" "He told me to tell the other fellows that if they wanted to go back to the I.S.U. to go back into it and they could have their jobs back", and that all of this was in the presence of the rest of the crew, (R. Vol. II pages 5 and 13).

As the Board said: "After the 23 men indicated that they would not follow the Captain's suggestion they were ordered off the ship and left with their belongings." (R. Vol. I p. 129).

On October 11, 1937, Brady, a representative of N.M.U. requested permission to board your petitioner's vessels. (R. Vol I p. 82). This was refused with a statement that a like policy would be followed in regard to the I.S.U. representatives until after an election then pending. This was done. (R. Vol. II p. 17). After the voting of each vessel, Waid was given free access to her, while access was not given to the representative of N.M.U. Waid testified that he had never electioneered aboard a vessel. There was no supervision by any one of Waid's conduct. (R. Vol. I pages 82 and 83). However, his testimony was not contradicted or impeached. Brady desired permission to board the vessels for the purpose of electioneering. (R. Vol. II p. 122).

Based upon these facts your petitioner was tried and convicted by the National Labor Relations Board of violating the National Labor Relations Act. At the trial only five of the former members

of the crew testified. Each of these five had obtained his employment as a member of the crew of the "Saccarappa" under and by virtue of his membership in the I.S.U. (R. Vol. II pages 20, 31, 32, 36, 43, 45, 46, 52, 53, 54, 60, 61, 68, 69).

Four of these witnesses had after October 6, 1937, obtained regular employment; three of them at a higher wage. Three of these four had voluntarily left their new employment to come to the trial. (R. Vol. II pages 16, 42, 43, 51, 52, 58). One left his new employment because his wife was sick. (R. Vol. II p. 59). The unemployed witness had taken a sixty or seventy day vacation at his home in an inland town before attempting to obtain other employment. (R. Vol. II p. 35). Three of the former crew had been reemployed by petitioner. The remaining fifteen men did not testify at the trial and it was testified on their behalf that they were not available because they were out at sea or otherwise away from the place of trial. As to these men there was no evidence of their former earnings and no reliable indication as to whether or not they had obtained any employment from the time of their discharge to the date of the trial. (R. Vol. I p. 137).

In convicting your petitioner the Board made its findings of fact and conclusions of law, and then ordered your petitioner to:

"Take the following affirmative actions which the Board finds will effectuate the policies of the Act";

Offer the former crew reemployment;

Offer the former crew back pay including subsistence from the date of their discharge until they are offered reemployment, less their net earnings during that time.

Grant passes to authorized representatives of the N.M.U. and to other labor organizations of its employees in equal number and under the same conditions as it grants passes to I.S.U. or its successor.

The Board made no finding that it was necessary to award reinstatement or back pay in order to effectuate the policies of the Act. The Board did not find whether or not any former employee had obtained regular and substantially equivalent employment after his alleged wrongful discharge.

The Circuit Court of Appeals for the Fifth Circuit refused to set aside the order and directed your petitioner to take the same action required by the Board. Your petitioner now seeks to have that decision and order of the Fifth Circuit Court of Appeals reviewed for the four reasons stated under "Questions presented."

FIRST GROUND FOR GRANTING CERTIORARI

The first question is an important one of Federal Law which has not been, but which should be settled by this Court, and the lower Court has decided it in a way probably in conflict with applicable decisions of this Court.

The lower Court in its opinion called attention to the Board's position "that the refusal to sign on the 23 N.M.U. men and the signing of the I.S.U. men in their stead, was in no sense an agreement then for a closed shop, but was merely a yielding by petitioner under the threat of a strike to the unwarranted demands of the I.S.U." (R. Vol I p. 179).

One month later this Honorable Court held in *U. S.* vs *Hutcheson* (Number 43 this Term) that it is perfectly legal for a labor union to call a strike for the purpose of compelling an employer to discharge from its employ members of another union.

The American Law Institute's Restatement of the Law of Tort §790 states:

> "Dismissal by an employer of an employee is a proper object of concerted action by his employees if the employee
>
> * * * * * *
>
> "(c) refuses to become or remain a member of a labor union satisfactory to them, or has been legally suspended or expelled from such union."

The National Labor Relations Act provides that nothing in the Act "shall be construed so as to interfere with or impede or diminish in any way the right to strike." Title 29 §163 U.S.C.

The Act also provides:

"That nothing ** shall preclude an employer

from making an agreement with a labor organization ** to require as a condition of employment membership therein **." Title 29 §158 (3) U.S.C.

Mr. Chief Justice Taney on page 572 of 14 Peters stated:

"The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented and upon which both are acting, it is an 'agreement'."

We submit that if the object of the strike is legal, then it necessarily follows that the compliance with the Union's demand is not a violation of the National Labor Relations Act. Such a compliance is the making of "an agreement" authorized by the Act.

To hold otherwise will greatly impair the right to strike. If an employer cannot comply with his employees' demand in this class of cases what use is the right to strike for those demands?

And what remedy has an innocent employer who as the Circuit Court of Appeals held tried to retain the former crew but was "made the victim of a dispute between rival labor unions." (R. Vol. I p. 177).

We submit that it is of great importance that this Honorable Court should set forth the employer's rights in this class of cases.

SECOND GROUND FOR GRANTING CERTIORARI

Erie Railroad v. *Tompkins* 304 U. S. 64, 78 declared:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts."

Six Companies of *Cal.* v. *Joint Highway District* (Number 267 this Term) held that the decision of an intermediate Appellate Court is just as binding as the decision of the State Supreme Court.

The contract in question was executed June 4, 1935. (R. Vol. II p. 127).

The National Labor Relations Act was not approved until July 5, 1935. There is nothing in that Act which required the National Labor Relations Board to approve these contracts.

This Honorable Court considered Article II §1 of this contract in *National Labor Relations Board* v. *Waterman Steamship Company.* In the *Waterman* case the seamen were refused reemployment at Mobile, Alabama. This Honorable Court in 309 U. S.

on page 219 and in f. n. Number 11 took its law from Alabama precedence and held that the contract merely required *Waterman* to give preference of employment to members of the I.S.U. as vacancies occurred and that no vacancy occurred by reason of the termination of a foreign voyage.

Your petitioner was not a party to the *Waterman* suit and, of course, is not bound by the judgment in that case.

So far as your petitioner is concerned the parties intended that the contract would be performed and it was performed at Savannah, Georgia. It was at Savannah, Georgia, that the seamen in question were refused reemployment.

Your petitioner contended and now contends that under the decision of September 30, 1931, in *Gary* vs *Central of Georgia Railway Company*, 44 Ga. Appeals 120, 125, it is the settled law of Georgia that the present contract contained an implied term requiring the seamen to retain their membership in the I.S.U. and that for a violation of this term your petitioner was required to discharge them.

The lower Court refused to consider this contention. It had just previous to the decision in the instant case held in *Illinois Central Railroad Company* vs *Moore* 112 Fed (2d), 959, that the doctrine of *Erie* vs *Tompkins* "applies only to local matters governed wholly by State law," and that a union contract applying in many states is not

such. "Its meaning and effect ought to be the same in each State." One Judge dissented and took the opposite view.

After the decision in the instant case this Honorable Court reversed the *Illinois Central* case. *Moore* vs *Illinois Central Railroad Company.* (Number 550 this Term).

But in reversing the lower Court this Honorable Court failed to approve either the majority view that the construction of a collective bargaining agreement was a question of general law or the minority view that it was a question of State law, with the result that this highly important question is now in confusion and should be settled by this Honorable Court.

THIRD GROUND FOR GRANTING CERTIORARI

At the time of the decision of the National Labor Relations Board in the instant case the Board consisted of Mr. Donald Wakefield Smith, Mr. Edwin S. Smith and Mr. J. Warren Madden. Mr. Donald Wakefield Smith took no part in the consideration of the Board's decision. (R. Vol. I p. 144) Mr. Edwin S. Smith's views that in every case where the Board finds that the National Labor Relations Act has been violated the Board must, without the exercise of any discretion, award reinstatement with back pay, were well expressed in the *Cape Cod Trawling* case decided April 25, 1940 and appearing as advance pamphlet Number 18 of Volume 23 of N.L.R.B.

In that case the employer's fishermen who were affiliated with the A. F. of L. threatened to strike unless the employer discharged its radio operators who were affiliated with the C.I.O. The employer complied with the fishermen's demand.

Mr. Edwin S. Smith and Mr. Madden held that this was a violation of the National Labor Relations Act. Mr. Smith there stated:

> "Conceding that the pressure from the Fishermen's Union placed the respondents in an unenviable position, the issue that we must face is whether the respondents, who have violated the law, or the three employees in question, who are blameless, should bear the burden of the respondents' actions. We can see no valid reason for shifting the loss caused by the respondents' unfair labor practices even though the unfair labor practices in turn arose out of matters beyond the respondents' control, from the respondents themselves to the victims of their unlawful acts, who are certainly less able to bear the burden."

Dr. Leiserson, who had taken Mr. Donald Wakefield Smith's place on the Board, dissented stating that in his opinion compliance with the fishermen's demand was not a violation of the National Labor Relations Act but that:

> "If, under this authority, the action of the respondents in the present case must be held to constitute technical unfair labor practices, the Act (Section 10 (c) still leaves to the discretion of the Board the determination whether the affirmative remedy of reinstatement with or without back pay would effectuate the policies of the Act."

No appeal was taken from this decision.

Mr. Madden's term has expired. The new Chairman has not expressed any views upon this subject. But in *National Labor Relations Board* cases Numbers C 1392-1393 January 4, 1941, not yet reported, and in which the new Chairman did not participate, Mr. Smith's views that the Board has no discretion and that it must necessarily award reinstatement with back pay whenever it finds that the Act has been violated, were reiterated. Dr. Leiserson stated that he felt he was forced to concur with Mr. Smith because of the majority ruling of the old Board in the *Cape Cod Trawling* case from which he had dissented.

No Court of any kind has passed upon this question. If this Honorable Court permits the present case to stand Mr. Smith's views as to a lack of discretion in the Board, will be considered as settled law, and Dr. Leiserson's view that the Board has a discretion, will be abandoned without ever having had its day in Court.

The other question raised by your petitioner in regard to the award of reinstatement with back pay will probably be settled by the decision of this Honorable Court in *N.L.R.B.* vs *Phelps Dodge Corporation* (Number 641 this Term) now under consideration.

FOURTH GROUND FOR GRANTING CERTIORARI

A ship owner is under a duty to grant per-

mission to the bargaining agent of its seamen to board its vessels to consult with the crew:

> "Since access of union representatives is necessary to the union's procedure of dealing with grievances of such unlicensed maritime personnel and no other methods afford such unlicensed personnel 'effective' opportunity to bargain collectively concerning grievances ***." *Cities Service Oil Co.*, et al., N.L.R.B. Nos. C-1270-1272. July 3, 1940. Reported U.S. Law Week Volume 9—Section 2, page 2037, July 16, 1940, not yet reported.

In the instant case the Board holds that if your petitioner grants passes to board its vessels to the bargaining agent of its employees it must grant similar passes to representatives of rival unions.

We submit that this important question should be settled, and an employer told what his duty is in this regard.

Respectfully Submitted:

EDWARD BRENNAN,
Attorney for Petitioner
P.O. Address: Savannah, Georgia.

ADAMS, DOUGLAS & BRENNAN,

W. WALTER DOUGLAS,
Of Counsel.

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CHARLES ELMORE CROPLEY
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No. 969

In the Supreme Court of the United States

OCTOBER TERM, 1940.

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

EDWARD BRENNAN
Savannah, Georgia
Attorney for Petitioner

ADAMS, DOUGLAS & BRENNAN
W. WALTER DOUGLAS
Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No._____

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The petition for review filed with the Fifth Circuit Court of Appeals in this case (R. Vol. I p. 2) raised many questions, some of law, some of fact, and some mixed. Petitioner there, amongst other things, contended that assuming that the written agreement of June 4, 1935, (R. Vol. II pages 127, 129) should be construed according to the "general law" so that it merely provided for preference of employment; nevertheless by reason of the intention of the parties, their course of conduct and express oral agreements, the written contract was, in 1935, converted into one for a "closed shop."

Since that position involves questions of fact, petitioner does not now urge it. The petition for the writ of certiorari confines itself to four important questions of law.

One.

Petitioner's right to comply with the I.S.U.'s demand.

The first question was not passed upon by the National Labor Relations Board.

Notwithstanding petitioner's repeated requests (R. Vol. I pages 20, 93, 160, 161, 162) the Board failed and refused to make any findings of fact or of law in regard to the I.S.U.'s right on October 6, 1937, to demand with threat of strikes, that petitioner only reship members of that Union, and of petitioner's right to comply with that demand. But the facts are clear. The National Labor Relations Board has never contended that the petitioner and the I.S.U. could not have made a valid written close shop agreement on October 6, 1937. The position taken by the Board is stated by the Circuit Court of Appeals as follows: (R. Vol. I p. 179).

> "That the refusal to sign on the 23 N.M.U. men and the signing on of the I.S.U. men in their stead was in no sense an agreement then for a closed shop, but was merely a yielding by petitioner under threat of a strike to the unwarranted demands of the I.S.U."

The Circuit Court of Appeals held (R. Vol I p. 179):

> "We think it equally clear that petitioner's yielding to the threat of a strike and dis-

> charging these N.M.U. men under that threat was not intended by the parties to be nor was it the making of an oral closed shop agreement."

We can find nothing in the National Labor Relations Act nor in the decisions construing it which requires that a collective bargaining agreement be reduced to writing, in the absence of a request by one of the parties.

The Board has recognized that oral closed shop agreements are valid. Matter of *United Fruit Company* 12 N.L.R.B. 404.

While the June 23, 1938 amendment to the Merchant Marine Act (c 600 §45, 52 Stat 965; Title 46 §1251 et seq., supplement to United States Code Annotated) encourages the making of written agreements between ship owners and their employees, it does not invalidate oral agreements. (See Title 46 §1254 U.S.C.A. Supplement). Besides this amendment was not adopted until long after the present controversy arose.

Unquestionably on October 6, 1937, the mind of petitioner and the mind of the I.S.U. met. A complete understanding was had and the employees were publicly notified that petitioner would require as a condition of employment membership in the I.S.U.

We submit that this was an agreement authorized by the Act.

The Supreme Court of Georgia, in the case of *Smith* vs *Jones,* 185 Ga. 236, 241, states:

> "There are methods of expressing agreement other than by word of mouth. Conduct can be as articulate as language. An old adage declares that actions speak louder than words ***. Webster *** gives, as one of the definitions of the word 'agreement'. 'a concurrenee in an engagement that something shall be done or omitted.' The first definition of the word 'agreement' given by Bouvier is 'A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.' 'But' continues Bouvier, 'the assent need not be formally made; it can be inferred from the party's act; L.R. 6 Q.B. 607; L.R. 10 C.P. 307; 90 Ala. 529 (8 So. 144)'."

This Honorable Court in the case of *Holmes* vs *Jennison* 14 Peters 540 had before it two questions, the second of which was the meaning of the word "agreement" appearing in Article I Section 10 Clause 3 of the Constitution of the United States, which prohibits any state, without the consent of Congress, from entering into any "agreement" with a foreign power. Mr. Chief Justice Taney, on page 572, stated:

> "The word 'agreement' does not necessarily import any direct or express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement'."

And on page 573:

> "So an agreement, after Holmes had escaped to Vermont, written and signed by the State and provincial authorities, by which the Governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would unquestionably, be unconstitutional. Yet precisely the same thing is done in this case without a regular and formal agreement. It is, in some way or other, mutually understood by the parties that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed that the constitutionality of the Act depends on the mere form of the agreement?"

The Chief Justice then held, at the top of page 574; that the word "agreement" was broad enough to include agreements "either in writing or by parol, formal or informal.

Apparently on this branch of the subject the Chief Justice was speaking for the whole court. See *U. S.* vs *Rauscher,* 119 U.S. 407, commencing at the bottom of page 412 and continuing to the middle of page 414.

But if for any technical reason a valid "closed shop" agreement was not made on October 6, 1937, we nevertheless submit that since *U. S.* vs *Hutcheson* (Number 43 this Term) declares the demand of the I.S.U. was perfectly legal, then it necessarily follows that petitioner's compliance with that demand was likewise legal, and that the following views of Dr. Leiserson expressed in his dissent in

the *Cape Cod Trawling Corporation* case decided April 25, 1940, and appearing as advance pamphlet Number 18 of 23 N.L.R.B. are sound:

> "In view of this provision, I cannot believe that Congress intended the employer to be held guilty of an unfair labor practice when he is forced to dismiss an employee by a strike or by other legal concerted activities of union members."

The new Chairman has not expressed his views but Dr. Leiserson has considered that he has been overruled. In re *Mooremack Gulf Lines, Inc.* N.L.R.B. Nos. c. 1392-3 January 4, 1941, not yet reported.

The present case differs from the *Waterman* case. In that case there was no demand by the I.S.U.; there was no threat of strike; what Waterman did was apparently gratuitous.

With the prevalent widespread warfare between rival unions of the A.F.L. and C.I.O. to gain supremacy and in which the employer is frequently, as in the case at bar, made an innocent victim, it is vitally important that this Honorable Court determine the rights of the employer as to whether or not he violates any law when he yields to the demands of a union which is the bargaining agency of his employees and which threatens the employer with strike if the employer either employs or keeps in his employ members of the rival union and in this connection that this Honorable Court deter-

mine what constitutes a valid "closed shop' agreement under the National Labor Relations Act.

Two.

The contract was to be performed in Georgia and should be construed in accordance with the laws of Georgia. The law of Georgia is that in such a contract there is an implied agreement that the members of the Union shall retain membership in the Union as long as they continue in the employ of the employer.

In 1935, prior to the enactment of the National Labor Relations Act and prior to the organization of the N.M.U., petitioner, along with other shipping companies, entered into an agreement with the I.S.U., an A.F. of L. affiliate. (R. Vol I p. 176; Vol. II p. 127).

This agreement provided:

> "Article I Section 2 (e) *** every effort shall be made by the representatives of the Union and the Company involved amicably to adjust ** (b) *** any *** dispute or difference which may arise or exist between individual Shipping Companies and their employees covered by this agreement, or between said Companies and Union, or any other dispute or difference which may arise concerning the interpretation or performance of this agreement." (R. Vol. II p. 129).

The same paragraphs state that if the effort is unsuccessful the dispute or difference shall be submitted to a local Board of Arbitration.

Section 1 of the same Article (R. Vol. II p. 128) provides for an appeal to a District Board.

Paragraphs (d) and (e) of this section state that the decisions of the District Board shall be final and conclusive. "Appropriate disciplinary measures shall be taken against any employee and any supervisory official who acts in violation of any decision of the Board."

Article II Section 1 of the agreement (R. Vol. II p. 129) as construed by this Honorable Court in *N.L.R.B.* vs *Waterman* 309 U.S. 206 merely required that as vacancies occur preference of employment be given to members of the I.S.U.

The parties intended that petitioner would perform the contract at Savannah, Georgia, its headquarters and the home port of its vessels. If your petitioner had done what the United States Circuit Court of Appeals for the Fifth Circuit now holds it should have done on October 6, 1937, at Savannah, Georgia, petitioner would have been subject to a suit by the International Seamens Union of America brought in the Superior Court of Chatham County, Georgia, seeking damages and an injunction. We submit that, that Court would have followed the settled law of Georgia, and held that the plaintiff had breached its contract with the I.S.U. because that contract contained an implied term requiring the seamen to retain their membership in the I.S.U.

This Honorable Court should construe the contract according to the laws of Georgia, the place of performance,

Cox vs *U. S.* 6 Peters 172.

Gary vs *Central of Georgia Railway Company* 44 Ga. Appeals 120 on page 125 states:

> "It is unreasonable to suppose that the brotherhood or its officers would have continued to represent the plaintiff after his resignation from the organization, and undoubtedly they would have had no authority to do so in the absence of further action on his part conferring such authority upon them. Under the plaintiff's own theory of the case, the defendant had the right to expect that his membership in the organization would be continued, in order that he might be amendable to the rules and regulations of the brotherhood, under which he was employed, and remain subject to be dealt with through this organization for certain purposes referred to in the contract, and relating to the conditions of his employment. When he resigned from the organization he in effect abrogated certain material provisions of the contract between him and the defendant, and because of this breach on his part the defendant had the right to treat the contract as ended, and to be released from all future liability thereunder."

Article I Section 1 of the written contract provides for the mediation, conciliation and adjustment of any grievance, dispute or difference which may arise or exist between petitioner and its employees.

Paragraph (d) of that section provides that appropriate disciplinary measures shall be taken against any employee who acts in violation of any such decision.

Paragraph (e) of Section 2 of Article I provides that before submitting any matter for a decision "every effort shall be made by the representatives of the Union and the company involved amicably to adjust the same."

We submit that the instant case falls clearly within the Georgia rule for how can the I.S.U. represent a member of the N.M.U. in that members dispute with petitioner and how can the I.S.U. take appropriate disciplinary measures against that employee?

Such disputes are quite frequent and are usually settled by the Union delegate. (R. Vol. II pages 90, 100, 101).

In order that there can be no doubt as to the similarity of *Gary* vs *Central of Georgia Railway Company* and the case at Bar we have obtained from the Clerk of the Court of Appeals of Georgia exemplified copies of the record in that case and are filing them with the Clerk of this Court. This Honorable Court will notice that the contract there sued upon was contained in a pamphlet attached to an amendment and was simply a "schedule of wages, rules and regulations" agreed to by both the employer and the union. These rules did not require any employee to become a member of the union. These rules do not expressly prohibit any employee from leaving the union. Nevertheless the Georgia Court of Appeals held that Gary, who had been a member of the Union, was

impliedly required by these rules to remain a member of the union.

In the instant case petitioner had the right to expect that the crew, who had been hired under the collective bargaining agreement with the I.S.U., and had been furnished to petitioner by the I.S.U., would retain their membership in the I.S.U. in order that they might be amendable to the rules and regulations of the I.S.U. and remain subject to have their differences between petitioner and them dealt with through the I.S.U.

We submit that Congress has not taken over this branch of the law by reason of the National Labor Relations Act or by reason of the June 23, 1938, amendment to the Merchant Marine Act, but if it has that is immaterial.

The National Labor Relations Act was adopted after the contract was executed. There is nothing in that Act relating to the form or the filing of collective bargaining agreements.

The amendment to the Merchant Marine Act was adopted after this controversy arose.

Three.

The award of back pay.

Title 29 §160 (c) U.S. Code Annotated Supplement provides:

> "*** the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person

> to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this chapter ***."

The 6th headnote to the case of *N.L.R.B.* vs *Fansteel Metallurgical Corporation* 306 U.S. 240 states:

> "An order of the National Labor Relations Board requiring reinstatement of employees must be supported by specific findings."

Despite the fact that Petitioner was made the innocent victim of a dispute between rival Labor Unions, the Board imposed the severest penalty which the law permitted.

There is no finding of the Board in this case which would authorize the Court to say that the Board exercised a discretion or deemed it necessary to award reinstatement and back pay so as to effectuate the policies of the Act. Since the present decision was by Mr. Edwin S. Smith and Mr. Madden presumably the order for reinstatement and back pay followed their views (quoted on page 16 of the petition for the writ of certiorari) that when the National Labor Relations Board has found that an employer has in violation of the Act dismissed employees, the Board must without the exercise of any discretion and as a matter of course, order reinstatement with back pay; that the discharged

employees are as a matter of right entitled to such an award.

We submit that these views have been condemned in *Republic Steel Corporation* vs *N.L.R.B.* decided by this Honorable Court on November 12, 1940.

The National Labor Relations Act does not give to the seamen or to any private party any private rights. *Amalgamated Utility Workers* vs *Consolidated Edison Company* 309 U.S. 261.

If the seamen had been unlawfully discharged they would have been limited to an extra month's wages as compensation. 46 U.S.C.A. §594. The Steel Trader 275 U.S. 388; The Losmar 20 Fed. Supp. 887.

But the seamen had libelled the S/S "Saccarappa" alleging that they were illegally discharged. The case was tried at Charleston, South Carolina, within the Fourth Circuit, and Judge Myers, there stated:

> "Examination under oath of one of the libelants, and subsequent admissions of fact developed that libelants, having been paid off and discharged in the port of Savannah, under the terms of the shipping articles which they had signed, desired to sign up for the contemplated foreign voyage, and were referred to the representatives of the Union furnishing the crew under contract, which representatives refused to sign them on, admittedly because of their change of affiliation from the International Seamens Union, of which they had previously been members, to membership in the rival union known as the Na-

tional Maritime Union, an affiliate of the Committee for Industrial Organization.

"It would be rather a strained construction of the Labor Relations Act in the respects relied upon to hold that these facts show any interference, restraint or coercion of the employees in the rights guaranteed to them under Section 7 of the National Labor Relations Act (29 U.S.C.A. §157), or any discrimination for the purpose of encouraging or discouraging membership in any labor organization, as prohibited by paragraph 3 of Section 8 (29 U.S.C.A. §158 (3)). In any event, Section 10 of said Act, (29 U.S.C.A. §160) provides that any unfair practices listed in section 8 (29 U.S.C.A. §158) are reviewable solely by the National Labor Relations Board, created by section 3 of said act (29 U.S.C.A. §153) with the exclusive power unaffected by 'any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'

"I therefore find that the libelants were not wrongfully and unlawfully laid off, or their services discontinued, in violation of the National Labor Relations Act in the respect relied upon; nor were they, as alleged, put out of employment by any willful and coercive attempt to force or encourage them to become members of the said labor Organization." The Saccarappa 21 Fed. Supp. 417.

This Honorable Court will note that petitioner is ordered to pay almost four years back wages.

The National Labor Relations Board of its own motion on May 18, 1939, dismissed the election proceedings, 12 N.L.R.B. 766 et seq., because of the

long lapse of time from the voting of petitioner's vessels, which had been completed in November, 1937.

We respectfully submit that the present record clearly indicates the failure by the Board to exercise any discretion.

The statute clearly states that the Board is at liberty to either award back pay or not award back pay. But if it awards back pay it must first find that such an award is necessary to effectuate the policies of the Act.

Fourth.

The granting of passes.

The seamen on the last of petitioner's vessels voted on November 28, 1937. (R. Vol. II p. 126). The result was formally declared in an intermediate report on December 14, 1937. (R. Vol. II p. 127).

The amended charge of January 7, 1938, alleged that petitioner had illegally denied passes to the N.M.U. (R. Vol. I p. 38).

The election was formally dismissed by the Board of its own motion, because of the lapse of time, on May 18, 1939. (12 N.L.R.B. 766 et seq.).

The Board on May 31, 1939 (R. Vol. I. pages 120, 144) issued its orders directing your petitioner to grant passes to board its vessels to the N.M.U. and other unions under the same conditions that it grants passes to the I.S.U. and its successors. No election was then pending.

It is respectfully submitted that an employer is entitled to know his rights and duties in regard to the issuance of passes to board its vessels to representatives of various unions.

Conclusion.

For the reasons urged in the petition and in this brief petitioner submits that this case is one in which a writ of certiorari should issue.

Respectfully Submitted:

EDWARD BRENNAN
Attorney for Petitioner
P. O. Address: Savannah, Georgia.

ADAMS, DOUGLAS & BRENNAN,

W. WALTER DOUGLAS,
Of Counsel.

APPENDIX

NATIONAL LABOR RELATIONS ACT.

The Supplement to Title 29 §150 et seq., United States Code.

§158. It shall be an unfair labor practice for an employer—

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this chapter or in sections 701 to 712 of Title 15, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this chapter as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in esction 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject

to the provisions of section 159 (a) of this title.

§159 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

§160 (c) Reduction of testimony to writing; findings and orders of Board. The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has en-

gaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

§163. Nothing in this chapter shall be construed so as to interfere with or impede or diminish in any way the right to strike.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 969

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. I, 175) is reported at 116 F. (2d) 480. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 121–144) are reported at 12 N. L. R. B. 1367.

JURISDICTION

The decree of the Court below was entered on February 13, 1941 (R. I, 199). The petition for a

writ of certiorari was filed on April 21, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon a valid finding that petitioner had discriminated between two unions in the issuance of passes permitting union representatives to board its ships and had thus interfered with the employees' freedom of choice of bargaining representatives, the Board could validly issue an order requiring petitioner to cease its discrimination and to grant equal treatment to the two organizations in the matter.

2. Whether, under the circumstances of this case, the Board abused its discretion in ordering petitioner to reinstate with back pay 23 employees whom the Board found to have been discharged in violation of Section 8 (3) and (1) of the Act.

The following questions are urged by petitioner, but are not, we think, properly presented:

3. Whether, in the absence of a valid closed-shop agreement, it is an unfair labor practice for an employer to discharge employees on account of their union affiliations, when such discharge is demanded, upon threat of strike, by a labor organization representing a majority of the employees in an appropriate bargaining unit.

4. Whether the collective bargaining agreement made by petitioner and 42 other steamship companies with the International Seamen's Union, covering hiring, wages, hours of employment, and working conditions for seamen both at sea and in port, is to be interpreted in accordance with Georgia law because one of the provisions of the agreement affecting petitioner was to be performed in Georgia.

5. Whether the Board's back-pay order is rendered invalid because of the absence of any provision for the deduction of any losses caused by any willful refusal of employees to seek or accept employment.

6. Whether the Board's back pay order is rendered invalid because of the absence of any finding as to whether the discharged employees had obtained "other regular and substantially equivalent employment."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151, *et seq.*) are set forth in the Appendix, *infra,* pp. 21–22.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. I, 121–144). Omitting jurisdictional findings, the

facts, as found by the Board and concurred in by the court below, may be summarized as follows:[1]

On August 3, 1937, the crew of petitioner's vessel, the *Saccarappa,* signed shipping articles at Savannah, Georgia, for a foreign voyage, which commenced 2 days later (R. I, 126; II, 3). At that time there existed between petitioner and the International Seamen's Union of America, herein called I. S. U., a contract which contained the following provision, entitled "Preference":

> It is understood and agreed that, as vacancies occur, members of the International Seamen's Union of America, who are citizens of the United States, shall be given preference of employment, if they can satisfactorily qualify to fill the respective positions; *provided, however,* that this Section shall not be construed to require the discharge of any employee who may not desire to join the Union, or to apply to prompt reshipment, or absence due to illness or accident (R. I, 132; II, 129).

About September 20, 1937, the vessel returned from abroad to Charleston, South Carolina, where the crew signed off the articles (R. I, 126; II, 37, 3, 5, 32). Two members of the crew then quit their jobs (R. 126; II, 6, 68); the others remained at work in preparation for a coastwise trip, during which

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

cargo carried from abroad was to be discharged and freight loaded for the next foreign journey (R. I, 126; II, 6, 9–10, 57–58). The coastwise trip started about September 21, 1937 (R. I, 126; II, 3). En route between Charleston, South Carolina, and Wilmington, North Carolina, the members of the crew signed a coastwise pay roll (R. I, 126; II, 6, 55). On September 22, shortly after the *Saccarappa* arrived at Wilmington, an organizer for the National Maritime Union (N. M. U.) came on board and spoke to the men, following which the entire unlicensed crew joined the N. M. U. (R. I, 126; II, 6–7, 23, 64). The captain of the vessel, when informed by ship's delegate John Drews of the new union affiliation of the seamen, declared, "Whatever you fellows do has got nothing to do with me, anything you do is all right with me" (R. I, 127; II, 7; cf. II, 103–104).

While the *Saccarappa,* during the coastwise voyage, was temporarily at Newport News, Virginia, undergoing repairs, Drews asked Roger Cohan, petitioner's port superintendent, whether it made any difference to him to what union the men belonged (R. I, 127; II, 8–9). Cohan, according to Drews, replied that he was not interested in the men's union affiliation, and that "just as long as you do your work and attend to your business you have a job" (R. I, 127; II, 9). Members of the crew who heard this conversation testified that they interpreted Cohan's remarks as an assurance

that they would not be forced to leave the ship upon its return to Savannah (R. I, 127; II, 55, 48, 32). In response to similar questioning by Drews, the ship's captain declared that the work of each member of the crew was satisfactory, and that as far as he was concerned the men's jobs were secure (R. I, 128; II, 9). When the vessel arrived at Jacksonville and Drews was compelled to leave the ship because of illness in his family, the first assistant engineer dissuaded Drews from resigning and urged him to rejoin the ship at Savannah (R. I, 127; II, 10, 11). There is testimony that a third new seaman who joined the ship at Jacksonville was a member of the N. M. U. at the time he was taken on (R. I, 128).[2]

The *Saccarappa* arrived at Savannah on the morning of October 5, completing its coastwise voyage (R. I, 128; II, 3). Shortly after the arrival, Drews, having heard rumors that the men were to be discharged, again asked Port Superintendent Cohan whether the men's jobs were endangered by their having joined the N. M. U. (R. I, 128; II, 10–11). Cohan replied that the men would not lose their jobs, and that they would sign articles the following day for the next foreign voyage (R. I, 128; II, 10). During the day, when the men were paid for the coastwise trip, the cap-

[2] The testimony referred to is not in the printed record, but appears at pages 196–197 of the typewritten transcript of record filed in the office of the clerk.

tain and the first mate repeated Cohan's assurance that their positions were secure (R. I, 129; II, 11, 101, 57). The captain instructed the men to be on board the following morning at 10:00 a. m. to receive their physical examination and to sign the articles (R. I, 129; II, 101, 104). The men continued to work their regular shifts, and members of the unlicensed crew who went ashore that night left their belongings on shipboard (R. I, 129 II, 11, 28, 33, 55–56, 61). The captain testified that until about 10:00 a. m. of October 6 he had thought that the crew would make the next foreign voyage (R. I, 129; II, 106).

On the morning of October 6, a United States shipping commissioner, acting upon instructions from the captain and the agent of the I. S. U., refused to permit the unlicensed crew to sign shipping articles (R. I, 129; II, 13–14, 34, 57). When the men protested, the captain advised them that if they wanted to "sign on," they would have to rejoin the I. S. U. (R. I, 129; II, 13, 56, 104). The seamen declined to do so, whereupon they were ordered off the ship (R. I, 129; II, 14, 28, 49). They were paid for the number of hours they had worked after they had signed off the coastwise pay roll (R. I, 129–130; II, 13, 34). Early the next morning, October 7, the *Saccarappa* sailed from Savannah with an entirely new unlicensed crew (R. I, 130; II, 3).

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The Board found that the employment of the men did not terminate automatically at the end of a particular voyage, and that the members of the crew were employees of the respondent on October 6, 1937 (R. I, 131); that the men were refused permission to work, and were thereby discharged, because of their refusal to join the I. S. U. (R. I, 131); that the discharges were not required or justified by the provision of petitioner's contract with the I. S. U. according preference of employment to I. S. U. members (R. I, 132, *supra*, p. 4); that the agreement was never amended, either orally, in writing, or by the conduct of the parties, into a closed-shop agreement (R. I, 132–134); and that the discharge of the men constituted discrimination in regard to hire and tenure of employment, thereby encouraging membership in the I. S. U. and discouraging membership in the N. M. U., in violation of Section 8 (3) and (1) of the Act.[3] The Board further found that petitioner refused to grant passes to the N. M. U. to board its vessels and denied the N. M. U. access to its vessels for the

[3] The Board found that, even assuming that the employment of the men did terminate upon the completion of the voyage, the refusal to rehire the men for the next foreign voyage was not warranted by the contract, since the preferential hiring provision of that document was expressly made inapplicable to "prompt reshipment" (R. I, 134; II, 129). On the basis of an abundance of testimony, the Board found that the voyage which the men were prevented from making on October 6 was a "prompt reshipment" (R. I, 135–136; II, 91–93, 57–58, 14).

purpose of conferring with petitioner's crews, while granting these privileges to the I. S. U. (R. I, 139); that this discriminatory treatment was not required or justified by any provision of petitioner's contract with the I. S. U. (R. I, 139); and that by the conduct in question petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) (R. I, 139).

Upon the foregoing findings of fact, the Board ordered petitioner to cease and desist (a) from discouraging membership of its employees in the N. M. U. or any other labor organization by discrimination (R. I, 142); (b) from refusing to issue passes to representatives of the N. M. U. in equal numbers and under the same conditions as passes are issued to representatives of the I. S. U. (R. I, 142); and (c) from in any other manner interfering with the exercise by petitioner's employees of the rights guaranteed in Section 7 of the Act (R. I, 142). As affirmative action which it found would effectuate the policies of the Act, the Board ordered petitioner to offer reinstatement with back pay to the employees who were discriminatorily discharged (R. I, 143); to grant passes to N. M. U. representatives to the same extent that it grants passes to representatives of the I. S. U. (R. I, 144); and to post appropriate notices (R. I, 144).

On April 9, 1940, petitioner filed in the court

below a petition to review and set aside the Board's order (R. I, 2–23). The Board answered, requesting enforcement of its order (R. I, 29–35). On January 3, 1941, the court handed down its opinion and entered its decree enforcing the order of the Board with a modification not here material (R. I, 175–180, 199–201).

ARGUMENT

This case was decided by the same Circuit Court of Appeals which decided *Waterman Steamship Co.* v. *National Labor Relations Board,* 103 F. (2d) 157 (C. C. A. 5th), reversed, *National Labor Relations Board* v. *Waterman Steamship Co.,* 309 U. S. 206. The court below held that the essential issues of the present case—the interpretation of the "preference" clause of the contract and the discriminatory denial of passes to N. M. U. representatives—are governed by the *Waterman Steamship* decision (R. 179). This holding is manifestly correct.

The additional questions presented in the petition for certiorari which are not controlled by the *Waterman Steamship* case were either not urged before the Board or present no issue of general importance:

1. *Petitioner's alleged "right" to comply with the I. S. U.'s demand for the dismissal of N. M. U. members.*—The first branch of petitioner's argument on this point is that since the I. S. U. rep-

resented a majority of petitioner's employees on petitioner's six vessels, an appropriate unit,[4] it was entitled, even in the absence of a closed-shop agreement, to demand "with threat of strikes" that petitioner dismiss the N. M. U. members of the *Saccarappa* crew, and that petitioner's yielding to this threat was not an unfair labor practice (Pet. pp. 2–3, 10–12; Supp. Brief, pp. 2–7).

Petitioner admits that this contention was not passed upon by the Board, but asserts that it made "repeated requests" that the Board consider and make findings upon the issue (Supp. Br., p. 2). None of the record references listed by petitioner in its brief (*loc. cit. supra*) supports this assertion.[5]

---

[4] Although the Board made no express finding upon the point, it apparently assumed, for purposes of its decision, that the appropriate bargaining unit was, as petitioner contends, the unlicensed seamen on all six of petitioner's vessels, and that the I. S. U. represented a majority of the employees within the unit.

[5] The five record references relied upon by petitioner do not support its claim that its present contention was urged before the Board. R. I, 20, refers to the Petition for Review filed with the lower court, not with the Board; moreover, it recites that the purpose of the I. S. U.'s strike threat was to force "recognition of the existence of a closed shop agreement between the I. S. U. and petitioner * * *." R. I, 93, refers to petitioner's exceptions to the Intermediate Report. The cited page is completely devoid of reference to any threat to strike. R. I, 160, 161, 162, refer to petitioner's Motion for Rehearing, filed subsequent to the issuance of the Board's decision and order. At R. 160 petitioner charges that the Board "overlooked" the fact that prior to September 20, 1937, all the members of the crew of the *Saccarappa*

As we point out in the margin, the cited references relate only to petitioner's contention that the men were denied employment pursuant to a valid closed shop contract between petitioner and the I. S. U., a contention which both the Board (R. I, 134) and the lower court (R. I, 179) considered and found to be without substance. Since petitioner did not contend before the Board that the dismissal of its employees in response to the I. S. U.'s strike threat was not an unfair labor practice, and no extraordinary circumstances are alleged to excuse petitioner's failure to urge the contention, the point may not be considered by this Court. Section 10 (e) of the Act; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9th).

In any event, the contention is without merit. "The act prohibits unfair labor practices in all cases. It permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing

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belonged to the I. S. U.; at R. 161 the same charge is made with respect to the I. S. U.'s alleged representation of a majority of the employees in an appropriate bargaining unit, and it is asserted that had petitioner refused to bargain collectively with the I. S. U. on October 6, 1937, it would have been guilty of an unfair labor practice. At R. 162 petitioner contends that had it failed to heed the I. S. U.'s demand for the dismissal of the N. M. U. crew it would have "acted in bad faith and violated its contractual obligation" and the I. S. U. would have called a strike and tied up petitioner's vessels, to the detriment of interstate commerce.

in the statute permits or justifies its violation by the employer." *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9th). And see *McQuay-Norris Manufacturing Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7th); *National Labor Relations Board* v. *McKesson & Robbins, Inc.*, decided May 5, 1941 (App. D. C.).

In the second part of the question (Pet., p. 3), petitioner takes the somewhat inconsistent position that the *Saccarappa* crew was dismissed pursuant to "a valid closed shop agreement" entered into on the morning of October 6, 1937, when the discharges occurred. Petitioner never advanced this contention before the Board. In its verified answer to the Board's complaint, petitioner asserted that the failure to reship the *Saccarappa's* crew was based on the fact that the employment status of the men terminated automatically upon the completion of a voyage and the signing off of shipping articles, and that its contract with the I. S. U. required it to give "preference of employment" to members of the I. S. U. in the hiring of another crew (R. I, 51–52).[6] Between the time of the filing of the answer and the commencement of the hearing, the Board issued its decision in *Matter of Peninsular and Occidental Steamship Company*, 5 N.

[6] Petitioner asserted that it "failed to reemploy the said employees * * * because of the reasons hereafter expressly stated in this answer, *and for no other reason*" (R. I, 50). [Italics added.]

L. R. B. 959, holding that the employment status of a ship's crew does not terminate automatically upon the completion of a voyage. Petitioner thereupon shifted its position and sought to prove at the hearing that, prior to October 6, 1937, the preferential hiring contract had been modified, either orally or by a course of dealing, into a closed-shop agreement. Both the Board (R. 134) and the court below (R. 179) found against this contention. The contention that a closed-shop contract was made on October 6, 1937, was urged neither before the Board nor in the petition to review filed in the court below (R. I, 2–23); the argument was advanced for the first time in the brief filed by petitioner in the lower court.

In any event, the facts as found by the Board and as summarized in the Statement amply support the conclusion of the court below that "the petitioner's yielding to the threat of strike and discharging these N. M. U. men under that threat, was not intended by the parties to be nor was it the making of an oral closed-shop agreement" (R. 179).

2. *The contention that the contract should have been construed according to the law of Georgia.*— The argument that the preferential hiring contract between petitioner and the I. S. U. was required to be construed according to the law of Georgia, the alleged place of performance, and that under Georgia law the contract contained an "im-

plied term" (Supp. Br., p. 8) requiring the seamen to remain members of the I. S. U. or else be subject to discharge, likewise was not raised before the Board. As late as November 17, 1939, nearly 6 months after the issuance of the Board's decision and order, and prior to the commencement of review proceedings in the court below, petitioner filed with the Board, in support of its motion for a rehearing, a document entitled "Brief of Respondent [petitioner] on Proper Construction of Preference Clause in Agreement of March 9, 1936, between I. S. U. and Respondent." In this brief, which dealt extensively and exclusively with the question of the proper construction of the agreement, there is no indication that petitioner regarded the contract as governed by Georgia law. This contention was made for the first time in petitioner's brief in the court below, filed after this Court had reversed the decision of the lower court in the *Waterman Steamship* case, 103 F (2d) 157, which petitioner had previously insisted was controlling (Pet.'s Motion for Rehearing, R. I, 156). In view of these facts it is perhaps superfluous to point out that petitioner's assertion as to the intent of the parties concerning the *lex loci contractus* (Supp. Br., p. 8) is unsupported by any record citations; that the single Georgia decision upon which petitioner relies—*Gary* v. *Central of Georgia Railway Co.*, 44 Ga. App. 120—is factually remote from the instant case and is of doubt-

ful authority for petitioner's contentions; and that the contract in question was executed between the I. S. U. and 43 steamship companies, including petitioner, and deals with hiring, wages, hours of employment and working conditions, both at sea and in port, of all seamen employed by the various companies (R. II, 127–137).

3. *Alleged invalidity of the order for reinstatement and back pay.*—The question sought to be raised by subsections (a) and (b) of petitioner's third point (Pet. p. 4), namely, whether the Board has any discretion with respect to the ordering of reinstatement and back pay to employees who have been discharged in violation of the Act or whether it must order such relief as a matter of course, is not presented by the facts of the instant case. The Board did not order reinstatement and back pay in the case at bar because it thought such relief was mandatory under the Act, but because "Upon the basis of the * * * findings of fact and conclusions of law and pursuant to Section 10 (c) of the * * * Act" (R. 142), it was of the opinion that the affirmative action ordered would "effectuate the policies of the Act" (*ibid.*). The Board has never taken the position that Section 10 (c) requires the issuance of reinstatement and back pay orders in all cases; rather, as this Court pointed out in *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term, "in applying its authority over back pay orders, the Board has

not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

Subsection (c) (1) of petitioner's third point (Pet., p. 4) is that the Board abused its discretion in ordering back pay, in view of the fact that petitioner was allegedly "the innocent victim of a dispute between rival unions." Petitioner apparently believes that the loss of wages should be borne by the employees, who merely exercised the rights guaranteed them under the Act, rather than by petitioner, who discharged them in violation of the Act. The Board's conclusion that under the particular circumstances of this case the loss should be borne by the law violator rather than by the innocent employees, was obviously a proper exercise of its discretion. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9th); *McQuay-Norris Manufacturing Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7th); *National Labor Relations Board* v. *McKesson & Robbins, Inc.*, decided May 5, 1941 (App. D. C.); cf. *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term.

Subsection (c) (2) of petitioner's third point (Pet., p. 4) is likewise not properly presented in this case. Neither in its Answer to the Board's complaint, in its Exceptions to the Intermediate Report, nor at any other stage of the proceeding before the Board did petitioner contend that the

employees ordered reinstated had obtained "any other regular and substantially equivalent employment," request the Board to make a finding upon the point, or argue that the obtaining of such employment barred or in any way limited the Board's power to order affirmative action. Nor did the court below mention the matter in its opinion.

With respect to subsection (d) of its third point, petitioner does not, either in its petition or supporting brief, point to evidence of a wilful refusal by any employee to seek or accept employment. Nor did petitioner point to any such instance while the proceeding was before the Board, or ask the Board to make a finding with respect thereto. The only reference which petitioner made to the matter in the course of the administrative proceeding was the general statement in its Exceptions to the Intermediate Report (R. I, 106) that the Board's back-pay order was invalid because, *inter alia,* "if back pay is awarded the complaining seamen, there should be deducted therefrom not only the amount which they actually earned during the said period, but the amount which they could have reasonably earned during the said period." No specific instance was mentioned and the exception is unsupported by any references to the record. Obviously, the burden rested upon petitioner to bring to the attention of the Board any instance in which an employee failed without excuse to seek equivalent em-

ployment. Cf. *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term.

The question posed in subsection (e) of the third point (Pet. 5) is not presented by this record. The findings which "justify" the Board's award of reinstatement with back pay are those which are set out in its opinion holding that petitioner had violated Section 8 (3) by discriminatorily discharging the 23 members of the crew of the *Saccarappa* (R. I, 126–138). The Board found specifically that this award would "effectuate the policies of the Act" (R. I, 142).

4. *Alleged invalidity of the order to grant passes.*—While petitioner seeks to present this matter as if it involved the broad question of the scope of a shipowner's duty under the Act to grant passes to board its vessels to the various representatives of its employees (Supp. Br., p. 15–16), the issue actually involved is much narrower. All that the Board decided was that petitioner had unlawfully discriminated between the I. S. U. and the N. M. U. by issuing passes and granting access to its vessels to representatives of the former, while denying these rights to representatives of the latter. The order merely requires petitioner to cease this discrimination and grant equal treatment to each of the competing organizations. This is the same question which was presented and decided in the *Waterman Steamship* case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

RICHARD H. DEMUTH,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

ERNEST A. GROSS,
Assistant General Counsel,

BERTRAM EDISES,
Attorney,
National Labor Relations Board.

MAY 1941.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V, Secs. 157, 158, 159, 160) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the rep-

resentative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

SEC. 10 (e). * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances * * *

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No. 969

In the Supreme Court of the United States

OCTOBER TERM, 1940.

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE.

EDWARD BRENNAN
Savannah, Georgia
Attorney for Petitioner

ADAMS, DOUGLAS & BRENNAN
W. WALTER DOUGLAS
Of Counsel

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We submit that the Respondent's objections to the grant of the writ of certiorari are highly technical and wholly without merit. We, therefore, respectfully request that we may be permitted to make the following answer to them:

I.

The Respondent does not deny that on October 6, 1937, the ISU was the free and unassisted bargaining agent of an appropriate group of Petitioner's employees; that on that day the ISU demanded with threat of strike that Petitioner refuse to reemploy a small minority of such group unless such minority rejoin the union to which all of the remaining members of the group belonged, and that Petitioner on the same day reluctantly yielded to such threat, first giving such minority ample notice and a sufficient opportunity to retain their jobs. But Respondent contends that Petitioner did not raise before the Board the question of its right to comply with such demand or the question of whether or not such compliance amounted to the making of "an agreement".

We submit that this is without merit. The 6th exception to the Intermediate Report (R. Vol. I 91); the 10th exception to the Intermediate Report (R. Vol. I 93); the second ground for the motion for a rehearing before the Board (R. Vol. I 160, 161, 162) which motion the Board ordered orally argued and oral argument was had (R. Vol. I 168) completely answer the Board's contention.

But if for any reason these questions were not properly presented to the Board, nevertheless the Circuit Court of Appeals was authorized in its discretion to consider them. See §10 (e) of the National Labor Relations Act cited on page 22 of

the Respondent's brief. The Circuit Court of Appeals did consider them.

The Circuit Court of Appeals stated Petitioner's contention thus: (R. Vol. I 178)

> "Petitioner yielding to this insistence and this threat * * were in effect then making an oral agreement for a closed shop."

The Circuit Court of Appeals stated the Board's contention thus: (R. Vol. I 179)

> "(3) That the refusal to sign on the 23 NMU men and the signing on the ISU men in their stead was in no sense an agreement then for a closed shop but was merely a yielding by petitioner under the threat of a strike to the unwarranted demands of the ISU."

The Court then on the same page stated:

> "We think it equally clear that the petitioner's yielding to the threat of a strike and discharging these NMU men under that threat was not intended by the parties to be nor was it the making of an oral closed shop agreement."

United States Code Annotated Title 28, §347 foot note 37, page 369 states:

> "Questions passed on by the Circuit Court of Appeals will be considered in the Federal Supreme Court on certiorari though not raised in the trial court. Friend vs Talcott (Ill. 1913) 33 S. Ct. 505, 228 U.S. 27."

II.

Waid, the ISU delegate testified (R. Vol. II 83):

> "Q. Did you say anything to them (South Atlantic Steamship Company) about your interpretation or their interpretation of the meaning of that agreement?
>
> "A. Yes, I related the phraseology of that agreement to them, that inasmuch as the crew of the Saccarappa were now NMU, that they would have to get rid of them and hire nothing but ISU men."

And on the next page (R. Vol. II 84):

> "A. Yes, that is correct, you read that paragraph to me and I interpreted it to you in the office there, that inasmuch as these men had changed to NMU, that automatically made null and void, their membership in the agreement, and therefore they were not members of the ISU and therefore, I insisted that the men must be replaced by the members of the organization."

The Board found (R. Vol. I at the bottom of page 122 and the top of page 123):

> "At the close of the entire case counsel for the Respondent moved to amend the answer to conform to the proof and to dismiss the complaint for want of substantial evidence to sustain the allegations of unfair labor practices. The first motion was granted and the second was denied."

We know of no rule of law which requires a party to cite cases or authorities in his answer or in his exceptions to an Intermediate Report. The question of construing the collective bargaining agreement as one for a closed shop was clearly presented to the Board.

The Respondent on page 15 of its brief admits that the question of construing the collective bargaining agreement according to the laws of Georgia so as to imply a closed shop was argued before the Circuit Court of Appeals. See also the second ground of the motion for rehearing filed with the Circuit Court of Appeals. (R. Vol. I 186)

The Circuit Court of Appeals in its opinion (R. Vol. I 176) stated Petitioner's contention:

> "* * that under the undisputed facts there was no discrimination and no unlawful discharge for that petitioner had a closed shop contract, either written or oral or both with the ISU * *."

And (R. Vol. I bottom of page 178 and top of page 179):

> "The Board on its part insists that the written agreement by its terms was not for a closed shop but precisely to the contrary *******; (1) that no amount of construction of a plain agreement can in law change an agreement which in terms was not for, to one for, a closed shop * *."

The Circuit Court of Appeals then held (R. Vol. I 179):

> "We have carefully examined the record in the light of these contentions and we think it quite clear that the agreement in itself was not intended to be, and cannot by construction be made into, the closed shop agreement which the law permits and provides for."

It will be seen that the question of construing the contract according to the laws of Georgia so as to imply a closed shop was fully argued, was considered by the Circuit Court of Appeals, passed upon and rejected by it.

III.

Petitioner's exceptions to the Intermediate Report No. 45 and each of its subdivisions (a) through (k) (R. Vol. I 105, 106, 107) state the reasons why the award of back pay is erroneous. We submit that these exceptions are sufficiently elaborate to cover each of the points made by the South Atlantic Steamship Company as its third ground for granting the writ of certiorari.

It must be remembered that the decision of the Board now sought to be reviewed is not the decision of the present Board. The only member of the present Board who participated in this decision is Mr. Edwin Smith. Mr. Smith's views and the views of Dr. Leiserson, a member of the present Board, are in conflict. On pages 15, 16 and 17 of our petition for the writ of certiorari and page 6 of our supporting brief we discussed this conflict as it appeared in the decision of the Cape Cod Trawling Corporation. 23 N.L.R.B. April 25, 1940. We desire to quote once more from Mr. Smith's opinion in that case:

> "It should be pointed out, also, that the position taken by the dissenting opinion gives rise to grave administrative problems. The

> necessity under which a respondent purports to act in cases such as the present one is always relative in the degree of compulsion involved. If we are to permit considerations of the sort here advanced to constitute a defense to our *usual* order of reinstatement with back pay, it might well become impossible for the Board to sift out the cases where such a defense would be justified from those where it is merely a pretext to escape liability under the Act." (Italics ours)

Mr. Smith's position in that case, the respondent's position in the Phelps Dodge case, which has been decided since the filing of this petition, and the respondent's position in this case, where it seeks to justify an award of back pay to fifteen men who did not even testify that they wished reinstatement and back pay, where it seeks to award back pay to four men who had obtained regular employment without considering whether or not such employment was "substantially equivalent", where it seeks to award back pay to one man, who admittedly went on a vacation of his own choosing, clearly demonstrates that the Board wishes to continue the practice so severely condemned by this Court in the Phelps Dodge case.

We submit that while it is possible that the old Board was in the habit of making general classifications of cases in which back pay should be awarded, it certainly refused to judge each case on its merits. It is possible that the Board exercised its judgment to determine to which class a case be-

longed, but if it did so it is also certain that once the case fell into a particular class, back pay was awarded as a matter of course, notwithstanding the fact that the particular case might have been different from every other case in its class. It is quite apparent that no classification was based upon the good faith of the employer. No classification was based upon the fact that the employer acted under compulsion. No classification was based upon the fact that the employer was the "victim of a dispute between rival labor unions" as the Circuit Court of Appeals held Petitioner was. (R. Vol. I 177). Mr. Edwin Smith stated, these were matters which were not to be considered, and notwithstanding their presence the Board's "usual order" was to be entered.

Shall that practice be continued?

As we understand the Phelps Dodge case not only is the Board prohibited from following that practice, but the Board must consider the status of each individual employee and determine whether an award of back pay to that particular individual employee is necessary to effectuate the policies of the Act. We further understand that opinion to mean that the Board cannot, as it has done in the present case, issue a blanket order and leave questions affecting the individual employee to be considered in contempt proceedings brought by the Board against Petitioner.

The majority opinion in the Phelps Dodge case stated:

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§10 (e) and (f)), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."

There is nothing in the findings of the Board which even indicates how the award of back pay will "effectuate the policies of the Act". The bald statement by the Board in its Order that the South Atlantic Steamship Company of Delaware shall "Take the following affirmative action which the Board finds will effectuate the policies of the Act", (R. Vol. I 142) has been held by this Honorable Court (See Phelps Dodge supra) not to be a suffient disclosure of the basis of an award of back pay.

Respectfully Submitted:

EDWARD BRENNAN
Attorney for Petitioner

W. WALTER DOUGLAS
Of Counsel